

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

4
5 MEGAN KRAINSKI,

6 Plaintiff,

NO. 2:08-CV-0417-JCM-GWF

7
8 STATE OF NEVADA EX. REL.
9 BOARD OF REGENTS OF THE
NEVADA SYSTEM OF HIGHER
EDUCATION, et al.,

MOTION HEARING

10 Defendants.

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 WEDNESDAY, OCTOBER 15, 2008

16 10:00A.M.

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18 APPEARANCES:

19 For the Plaintiff: SUSAN CARRASCO, ESQ.

20 For the Defendants: CHRISTIAN GABROY, ESQ.

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24 Reported by: Joy Garner, CCR 275
25 Official Federal Court Reporter

JOY GARNER, CCR 275
LAS VEGAS, NEVADA (702)384-3188

1 **LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 15, 2008**

2 **10:00 A.M.**

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4 **P R O C E E D I N G S**

5
6 THE CLERK: This is the time set for
7 the hearing of defendants' motion to dismiss
8 third party complaint, Civil Case Number
9 2:08-CV-0417-JCM-GWF, Megan Krainski versus State
10 of Nevada, and all others.

11 Counsel, please note your
12 appearance for the record.

13 THE COURT: Mr. Gabroy?

14 MR. GABROY: Christian Gabroy for
15 third -- party plaintiff, Kenya Polee.

16 THE COURT: Thank you. Ms. Carrasco?

17 MS. CARRASCO: Susan Carrasco on behalf
18 of the university along with Yvonne Scott
19 Williams who is named as the third party
20 defendant.

21 THE COURT: All right. Thank you. You
22 may be seated.

23 I've reviewed this with my brain
24 trust and let me tell you what I'm inclined to
25 do, and then I'll give you a chance to argue.

1 And this is really related to the hearings that
2 we had yesterday, but it seems to me -- and this
3 is the time set, by the way, on the hearing on
4 UNLV's motion to dismiss third party complaint --
5 but again it seems to me that the university is
6 entitled to -- there is an instrumentality of the
7 state and so this is barred by the Eleventh
8 Amendment.

9 Also, I'm not -- I don't see
10 that it is really a proper third party claim
11 which is why I dismissed the coach out, but I
12 mean the primary thing I think is the Eleventh
13 Amendment. So what I'm inclined to do is grant
14 the motion.

15 MR. GABROY: Real quickly because we're
16 going to have an issue then, what I ask then is
17 jurisdictional grounds so we get the procedure
18 correct. You noted in your order the
19 jurisdictional question that we have. I abide by
20 that order, Judge. After reviewing the rules,
21 speaking with counsel, speaking with other
22 members of the bar, it should have been brought
23 as a cross claim pursuant to 13(h) with a
24 joinder.

25 THE COURT: When you say a cross claim,

1 say a counterclaim.

2 MR. GABROY: Well, the problem is that
3 because I named an individual defendant, then
4 that should have been joined as a cross claim.

5 THE COURT: Oh, I see what you are
6 saying. Okay, I'm sorry because you're right,
7 you're exactly right, it should be a cross claim,
8 yeah.

9 MR. GABROY: So, Judge, we're not
10 asking -- if we're going to look at the merits of
11 the third party complaint, that I have leave to
12 amend the caption as a cross claim for issues of
13 appeal.

14 THE COURT: I understand. What I'm
15 inclined to do is simply just to say it's barred
16 on the basis of sovereign immunity on the
17 Eleventh Amendment.

18 MR. GABROY: Okay, without addressing
19 the procedural --

20 THE COURT: Absolutely, but I mean
21 that's almost like icing on the cake, Mr. Garboy,
22 or whatever, a cherry on top of the sundae, or
23 however you want to put it. I mean the primary
24 reason is the -- you know, I want to be
25 consistent with the ruling I made yesterday.

1 MR. GABROY: Okay.

2 THE COURT: And so if you want me to
3 limit the ruling today just for that, I'm glad to
4 do that and say it's barred based on the Eleventh
5 Amendment.

6 MR. GABROY: And then also say we can
7 amend it as a cross claim.

8 THE COURT: Pardon me?

9 MR. GABROY: So we can amend it as a
10 cross claim.

11 THE COURT: Well, no, then you're out.
12 I mean it's out because of the -- I don't have
13 jurisdiction anymore. You could bring it in
14 state court I suppose, whatever you wanted to do
15 then in state court.

16 MR. GABROY: Or to file as a separate
17 action.

18 THE COURT: File a new lawsuit if you
19 want if you feel you've got grounds for it.

20 MR. GABROY: In federal court then?

21 THE COURT: Yes, some basis in federal
22 court, then you could file a lawsuit, sure, or
23 state court.

24 MR. GABROY: Because I think that's
25 what I prefer to do that if we can dismiss it on

1 jurisdictional grounds saying that the third
2 party complaint brought improper and, therefore,
3 the case is gone and I can file it as a separate
4 original action in federal court.

5 THE COURT: Well, what I'm inclined to
6 do is to grant their motion based on the Eleventh
7 Amendment on sovereign immunity and then it's
8 gone from here.

9 MR. GABROY: Okay.

10 THE COURT: Now, you can re-file it
11 wherever you want to. You can re-file in state
12 court if you feel you have state claims, and
13 that's fine, or if you feel you have a federal
14 claim, you can file it in federal court.

15 MR. GABROY: Well, the problem is that
16 I don't know if res judicata issues would take me
17 up taking you up to the Ninth Circuit and then
18 coming back down if we already have the separate
19 action filed in federal court, so what I'm asking
20 for is either one or the other. We either
21 dismiss it on its merits and consider a cross
22 claim that is brought proper, or we dismiss it
23 for jurisdictional grounds saying that the third
24 party complaint is improper and have the right to
25 re-file as a separate action in federal court.

1 THE COURT: But what would be the
2 reason for doing that?

3 MR. GABROY: It's so that if we get up
4 to the Ninth Circuit.

5 THE COURT: But I mean if you're going
6 to appeal my ruling, appeal it up, and God bless
7 you. I mean that's why God created San Francisco
8 was so you could appeal, so go to San Francisco,
9 you know, with my blessing, but again for me to
10 be consistent, I'd say that it's barred by the --

11 MR. GABROY -- the Eleventh Amendment.

12 THE COURT: -- the ruling I made
13 yesterday, and you're out.

14 MR. GABROY: Okay.

15 THE COURT: And just so I understand,
16 so I say you are out, now assume that I say
17 instead of that, I say, well, this is not a
18 proper third party complaint, you should have
19 brought it as a cross claim. So it's not a
20 proper third party complaint, it's dismissed, how
21 does that help you?

22 MR. GABROY: Because that's only
23 jurisdictional grounds. That's not based on the
24 merits, and I have the right to re-file as a
25 separate action.

1 THE COURT: But I mean why prolong
2 this? In other words, if, in fact, your cross
3 claim third party complaint counterclaim,
4 whatever you want to call it, is barred by the
5 Eleventh Amendment, why not that's the grounds
6 and then appeal it to the Ninth Circuit?

7 MR. GABROY: Because I don't want to
8 get to the Ninth Circuit and then to rule
9 jurisdictional grounds without getting to the
10 merits. What I don't want to happen is I don't
11 want the Ninth Circuit to refuse to address the
12 merits and say it's improper anyways, file a
13 separate action, and then we'll be back to base
14 one.

15 THE COURT: I don't know. I just don't
16 see the Ninth Circuit saying, you know, no, this
17 is not a proper cross claim, so we're going to do
18 that, and I'm going to address the merits.

19 MR. GABROY: Well, that's what I'm
20 afraid of and then we're back -- we're back right
21 down here for that same issue that we didn't
22 resolve today if I have the right to amend it to
23 a cross claim, and it's dismissed on the Eleventh
24 Amendment grounds.

25 THE COURT: Oh, so what you want to do

1 is you want to call it a cross claim and then --
2 but I mean I don't think -- I mean assume that I
3 give you leave to do that, it's still dismissed.

4 MR. GABROY: But it's still -- it still
5 prevents the Ninth Circuit from saying this is an
6 improperly titled third party complaint and you
7 have to file a separate action.

8 THE COURT: Do you have any difficulty
9 if I construe this as a cross claim and dismiss
10 it on the Eleventh Amendment? That's what you're
11 seeking then.

12 MR. GABROY: That's right.

13 THE COURT: Just for me to consider
14 this as a cross claim, it's not a proper third
15 party complaint.

16 MR. GABROY: Right.

17 THE COURT: Even considering it as a
18 cross claim, then it's still out on the basis of
19 the Eleventh Amendment.

20 MS. CARRASCO: So the Court would be
21 ruling --

22 THE COURT: And come on up. It doesn't
23 matter because this is not a heated hearing, so
24 it's not like we need to separate you two.

25 MS. CARRASCO: Okay.

1 THE COURT: Ms. Carrasco, come on up.
2 Is there any problem if I say even considering
3 this as a cross claim, it's out based on
4 sovereign immunity that UNLV is a state
5 instrumentality and is entitled to sovereign
6 immunity.

7 MS. CARRASCO: Right, your Honor, and I
8 think that is acceptable. The Court has
9 indicated that it's inclined to grant the motion
10 to dismiss based on the Eleventh Amendment
11 sovereign immunity, but there are -- he has
12 alleged claims against the university but also
13 Yvonne Scott Williams. So would the Court --

14 THE COURT: Is that the one I granted
15 previously? I granted one previously because
16 that was not a proper cross claim. She's out I
17 believe. Is that the track coach?

18 MS. CARRASCO: This is the track coach,
19 but the Court ruled on their motion for
20 preliminary injunction filed by the plaintiff and
21 did rule that it was an improper third party
22 complaint, but our motion to dismiss the
23 university did address the university as well as
24 Yvonne Scott Williams. So I just wanted to sort
25 of make sure that I was clear that the Court is

1 indicating Eleventh Amendment immunity --
2 sovereign immunity as to the university. And
3 then what about Yvonne Scott Williams?

4 THE COURT: I thought she was out.

5 MS. CARRASCO: Okay, so the Court's
6 prior order that she --

7 THE COURT: Dismissed her I thought.

8 MR. GABROY: Judge --

9 THE COURT: Considering this, so here's
10 the order is that I find that even considering a
11 cross claim, that UNLV is entitled to sovereign
12 immunity and so I would dismiss it. So I dismiss
13 it.

14 MR. GABROY: So we can consider the
15 individual defendant as a cross defendant, not as
16 a third party.

17 THE COURT: Well, except I already
18 dealt with her, though. I believe she was
19 dismissed out.

20 MR. GABROY: It was only on a motion
21 for preliminary injunction, nothing with a
22 dismissal of the claim, Judge.

23 MS. CARRASCO: I have the order, your
24 Honor.

25 THE COURT: Yeah, let me see the order

1 because I thought I dismissed her out.

2 MS. CARRASCO: May I approach?

3 THE COURT: Sure, just hand it right
4 there. (Reading.) Well, she was sued in -- she
5 being the track coach -- Williams was sued in her
6 official capacity, correct?

7 MS. CARRASCO: As well as her
8 individual capacity, your Honor, in the third
9 party complaint brought by --

10 THE COURT: (Reading.) I mean I think
11 I'd rather, if you want to dismiss her, on the
12 basis that you never had proper authority to join
13 her as a party to the cross claim.

14 MR. GABROY: I think, Judge, I think
15 that's a better choice so I can go ahead and I
16 can file an original separate action against her
17 individually in federal court.

18 THE COURT: Well, that's what I don't
19 want to do, though. I don't want to just
20 multiply this out and out and out. In other
21 words, I can dismiss the cross claim against the
22 university based on the Eleventh Amendment. And
23 considering this as a cross claim against the
24 track coach, Ms. Williams, you never sought
25 authority under Rule 13(h) to join her, and so I

1 could grant it on that basis.

2 MR. GABROY: And then, Judge, what I
3 would like then is --

4 THE COURT: But I mean then you're free
5 to appeal the whole thing up to the Ninth
6 Circuit.

7 MR. GABROY: Well, then I would like
8 leave to amend it as a cross claim then.

9 THE COURT: But that's -- even if I
10 consider it as a cross claim, that's what I'm
11 saying.

12 MR. GABROY: Even if we consider it as
13 a cross claim, it should be dismissed on the
14 Eleventh Amendment.

15 THE COURT: On the Eleventh Amendment
16 and also because considering it as a cross claim,
17 Williams was not a party to this, correct?

18 MR. GABROY: That's correct, Judge.

19 THE COURT: So in order to join her as
20 a party unlike on a cross claim, you have to have
21 sought leave of Court -- give that back to Ms.
22 Carrasco, please -- you would have had to seek
23 leave of Court under Rule 13(h), correct?

24 MR. GABROY: That's correct, Judge.

25 THE COURT: And you didn't do that.

1 MR. GABROY: That's correct, Judge.

2 THE COURT: So I'm dismissing on that
3 basis.

4 MR. GABROY: Then, Judge, the Court
5 then considers it as a cross claim for purposes
6 of appeal?

7 THE COURT: Well, that's not for me to
8 say. Considering it as a cross claim, it's
9 improper under the -- against UNLV because of the
10 Eleventh Amendment, against Ms. Williams because
11 you never sought leave of Court to join her under
12 13(h).

13 MR. GABROY: And, Judge, that's why I
14 ask leave to amend it as a cross claim now so we
15 can take it all up.

16 THE COURT: But I'm saying considering
17 it as a cross claim, why do you want to amend it?

18 MR. GABROY: So we don't get to the
19 Ninth Circuit and then --

20 THE COURT: But I mean I'm saying
21 considering it as a cross claim, you never sought
22 leave of Court, so it's out. The whole thing is
23 dismissed. It's gone.

24 MR. GABROY: Okay, and then so we can
25 have for purposes of appeal ask --

1 THE COURT: I don't know anything about
2 appeal. I'm not going to touch that. I can't
3 foresee everything and try to cover everything,
4 but the cross claim is out. And I mean your
5 cross claim, third party complaint, considering
6 it as a cross claim, it's out. As a third party
7 complaint, it's out.

8 MR. GABROY: Okay.

9 THE COURT: Okay? It's out on the
10 cross claim because -- even if I consider it a
11 cross claim, which you are asking me to do, then
12 the and university is still entitled to dismiss
13 under the Eleventh Amendment and Ms. Williams is
14 never joined -- was never properly joined as a
15 cross-claimant or as a -- what do they call them?
16 An additional party on the cross claim. So it's
17 out on that basis, all right?

18 MR. GABROY: All right. Would the
19 common law claims with the state claims that we
20 have as well, including the state claims against
21 UNLV, all right, you are not going to address
22 those -- dismissing those out?

23 THE COURT: No, no, I'm not touching
24 the state claims. I'm saying there's not federal
25 jurisdiction and I decline jurisdiction over the

1 state claims, all right?

2 Can you prepare an order, Ms.
3 Carrasco, and submit it, please?

4 MS. CARRASCO: Yes, sir.

5 THE COURT: All right.

6 MS. CARRASCO: Thank you.

7 MR. GABROY: Thank you, Judge.

8 THE COURT: Thank you.

9

10 (Whereupon, the proceedings concluded.)

11

12

13 I hereby certify that pursuant
14 to Section 753, Title 28, United States Code, the
15 foregoing is a true and correct transcript of the
16 stenographically reported proceedings held in the
17 above-entitled matter.

16

17 Date: October 17, 2008

18

/s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter

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